DOCKET FILE COPY ORIGINAL

RECEIVED

JUN - 9 1997

Federal Communications Commission
Office of Secretary

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

In the Matter of	)	
	)	
MCI TELECOMMUNICATIONS CORP.	)	
	)	
Petition for Declaratory Ruling Regarding	)	CC Docket No. 96-149
the Joint Marketing Restriction in	)	
Section 271(e)(1) of The Communications		
Act of 1934, as amended by the	)	
Telecommunications Act of 1996	)	

AMERITECH COMMENTS

Gary L. Phillips
Counsel for Ameritech
1401 H Street, NW
Suite 1020
Washington, DC 20005
(202) 326-3817

June 9, 1997

TABLE OF CONTENTS

Page

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of MCI TELECOMMUNICATIONS CORP. Petition for Declaratory Ruling Regarding the Joint Marketing Restriction in Section 271(e)(1) of the Communications Act of 1934, as amended by the Telecommunications Act of 1996	)))))))))	CC Docket No. 96-149

AMERITECH COMMENTS

I. INTRODUCTION AND SUMMARY

The Ameritech Operating Companies (Ameritech) respectfully submit the following comments on the above-captioned petition for declaratory ruling filed by MCI Telecommunications Corporation. In its petition, MCI seeks a declaratory ruling regarding the scope of section 271(e)(1) of the 1996 Act, as interpreted in the Non-Accounting Safeguards Order.[1] In particular, MCI asks the Commission to "clarify" that: (i) the examples of joint marketing cited by the Commission in the Non-Accounting Safeguards Order constitute a comprehensive enumeration of all activities covered by section 271(e)(1); and (ii)

---

[1] Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934, as amended, CC Docket No. 96-149, FCC 96-489, First Report and Order, released December 24, 1996.

that section 271(e)(1) does not prohibit dissemination of certain marketing materials, which MCI attaches to its petition.

As discussed below, MCI's petition should be denied. The general "clarification" of the Non-Accounting Safeguards Order which MCI seeks is not a clarification at all but, rather, a reversal of an important aspect of that decision. Thus, this request is nothing more than an untimely petition for reconsideration. The change that MCI seeks is also inconsistent with the Commission's responsibility to police compliance with section 271(e)(1).

MCI's request for a ruling that various marketing materials comply with section 271(e)(1) should likewise be denied. While those materials may not violate section 271(e)(1) quite as blatantly as the materials that precipitated Ameritech's pending formal complaint against MCI,[2] they strongly imply the availability of one-stop shopping to customers that MCI is serving by reselling Pacific Bell's local exchange services. In this respect, they violate section 271(e)(1) and the Commission's implementing regulations.

---

[2] Ameritech Corporation v. MCI Telecommunications Corp., File No. E-97-17 (alleging that an MCI advertisement that twice ran in the Chicago Tribune, the Detroit News, the Detroit Free Press, and the Cleveland Plain Dealer violated section 271(e)(1)). By public notice released May 21, 1997, the Commission announced, pursuant to section 1.1200(a) of its rules, that this proceeding would be treated as a "permit but disclose" proceeding under the ex parte rules. See Public Notice, DA 97-1062, released May 21, 1997.

Moreover, it is apparent that dissemination of some of these materials – specifically, the materials directed to potential Lifeline customers - clearly constitutes an unjust and unreasonable practice, in violation of section 201(b) of the Act.[3] Those materials wrongly tell customers that if they do not apply for MCI Lifeline service within 45 days, they will automatically receive MCI basic service. This is an outrageous form of consumer abuse and one that warrants swift and sure sanctions.

Finally, although MCI does not raise any issues that are specific to Ameritech's pending complaint against MCI, Ameritech notes that MCI refers to that complaint and mischaracterizes it in its petition. To correct any misimpression this micharacterization may leave, Ameritech explains below the basis for its complaint.

II. BACKGROUND: SECTION 271(e)(1)

Section 271(e)(1) of the 1996 Act prohibits the largest interexchange carriers from jointly marketing interLATA services with resold local exchange services obtained from a BOC until that BOC has received interLATA authority, or 36 months have passed from the date of enactment. In the Non-Accounting Safeguards Order, the Commission identified certain marketing strategies that

---

[3] Section 201(b) declares unlawful "any charge, practice, classification, or regulation that is unjust or unreasonable."

are prohibited by this provision. The Commission held that "section 271(e) restricts covered interexchange carriers from, among other things: providing a discount if a customer purchases both interLATA services and BOC resold local services; conditioning the purchase of one type of service on the purchase of the other; and offering both interLATA services and BOC resold local services as a single combined product."[4] The Commission held, further, that the provision prohibits covered interexchange carriers from "marketing interLATA services and BOC resold services to consumers through a single transaction," which the Commission defined "to include, at a minimum, the use of the same sales agent to market both products to the same customer during a single communication."[5]

As is clear from the words "among other things" and "at a minimum," this list of prohibited joint marketing activities was not intended to be exhaustive. Indeed, the Commission specifically held out the possibility that other activities, not listed above, might constitute joint marketing:

> We recognize that the principles we have adopted to implement the requirements of section 271(e) may not address all of the possible marketing strategies that a covered interexchange carriers might initiate to sell BOC resold local services and interLATA services to the public. We emphasize, however, that in enforcing this statutory section, we intend to examine the specific facts closely to ensure that covered interexchange carriers are not contravening the letter and spirit of the congressional prohibition on joint marketing

4 Non-Accounting Safeguards Order at para. 277 (emphasis added).

5 Id. at para. 278 (emphasis added).

> by conveying the appearance of 'one-stop shopping' BOC resold local services and interLATA services to potential customers.[6]

III. MCI'S REQUEST THAT THE COMMISISON RECONSIDER ITS SECTION 271(e)(1) RULES SHOULD BE REJECTED

Fueled, no doubt, by its concern that the marketing materials that are the subject of its petition violate the letter and spirit of section 271(e)(1), MCI asks the Commission to "clarify" the Non-Accounting Safeguards Order. Specifically, it asks the Commission to hold that the examples of prohibited joint marketing activities cited in the order are not examples, but rather a definitive list. This request should be rejected on both procedural and substantive grounds.

MCI's request is procedurally defective because it is, in reality, an untimely petition for reconsideration of the Non-Accounting Safeguards Order. While MCI couches its petition as a request for further explanation, the "explanation" MCI seeks is a revision, not a clarification, of the Non-Accounting Safeguards Order. That order specifically held that the enumerated list of prohibited activities was not definitive. It held, further, that the Commission would address particular marketing materials on a fact-specific basis. The Commission is not free to reverse itself in a declaratory ruling. A change in policy is permitted only in the context of a reconsideration of that order or a new

---

6 Id. at para. 282.

rulemaking proceeding, which would require, at a minimum, a new Notice of Proposed Rulemaking. MCI did not seek reconsideration of this aspect of the order, nor has it filed a petition for rulemaking. For this reason alone, the Commission must reject MCI's request.

In any event, MCI's request cannot be reconciled with the Commission's obligations under the 1996 Act. As the Commission recognizes, it cannot possibly anticipate and enumerate all of the various ways in which a carrier might engage in joint marketing. To limit the scope of section 271(e)(1), therefore, to a few specified activities, would be an abdication by the Commission of its responsibilities under the Act. MCI and others would undoubtedly find ways to circumvent the letter and spirit of section 271(e)(1), and the Commission would be powerless to prevent it.[7]

MCI claims that the possibility of legal action stemming from an activity not on the list is having a "chilling effect" on its marketing endeavors. This claim strains credulity. While the possibility of legal action may chill MCI's efforts to "push the envelope" and engage in even more blatant forms of joint marketing than the Commission's too-lenient rules already allow, it should not

[7] Ameritech was extremely disappointed with the Commission's overly narrow reading of section 271(e)(1) and believes that it fails to implement either the text or the intent of this provision. Rather than seek reconsideration, however, Ameritech placed its faith in the Commission's promise that, in any enforcement action, it would scrutinize the facts closely to ensure that the letter and spirit of the provision were upheld.

pose problems if MCI is intent on following the letter and spirit of the law. Virtually every business must operate within the confines of rules that are stated as general principles and that are applied on a fact-specific basis. In this respect, MCI's claim that the Commission's decision in the Non-Accounting Safeguards Order is having a chilling effect on its marketing is disingenuous; it is nothing more than an artifice by which MCI seeks the freedom to violate section 271(e)(1) without running afoul of Commission rules.

IV. THE MARKETING MATERIALS VIOLATE SECTION 271(e)(1)

The Commission should also deny MCI's request that the Commission validate the marketing materials attached to MCI's petition. Most of those materials violate the letter and spirit of the joint marketing rules.

For example, the second page of Exhibit A to MCI's petition jointly advertises MCI's local service and MCI Friends and Family long-distance service. While the Commission has held that carriers may advertise resold local and long-distance services in a single ad, carriers "may not mislead the public by stating or implying that [they] may offer bundled packages of interLATA service and BOC resold service, or that [they] can provide 'one-stop shopping' of both services through a single transaction."[8] In this regard, the Commission noted

---

[8] Non-Accounting Safeguards Order at para. 280.

that "the government 'may require commercial messages to appear in such a form, or include such additional information, warnings and disclaimers, as are necessary to prevent its being deceptive.'"[9]

MCI's mailing contains no information, warning or disclaimer that would inform the public that MCI may not offer one-stop shopping of local and long-distance services. Indeed, the mailing is designed to convey precisely the opposite impression. It directly juxtaposes MCI's local service with its Friends and Family long-distance service, touting how, "[w]ith MCI, service and savings were never so simple." It states: "Joining MCI is quick and easy" and then provides a single telephone number for consumers to call. Given these representations and the lack of a disclaimer, it would be unreasonable for the recipient of this material not to assume the availability of one-stop shopping.

Other materials attached by MCI are likewise designed to convey the availability of one-stop shopping, although somewhat more subtly. For example, the marketing materials in MCI Exhibit C, which were sent to MCI long-distance customers, boast:

One company. One bill. One call

And when you choose MCI for both local and long distance service, you get even more great benefits:

---

[9] Id., quoting 44 Liquormart, Inc. v. Rhode Island, 116 S. Ct. 1495 at 1505, n. 7, 1506 (1996).

- *One call for all your Customer Service needs*
- *One easy-to-read phone bill to pay each month*
- *One company to consult for all your communications*

Undoubtedly consumers reading these materials would assume, among other things, that they can avail themselves of one-stop shopping to purchase MCI local service, along with additional or different long-distance services from MCI. The Commission's joint marketing rules do not permit MCI to disseminate marketing materials that convey this impression.

Consumers also would be likely to assume that, once they purchase local and long-distance services from MCI, they will be able to obtain the benefits of one-stop shopping for all of their future communications needs. Although it is possible to read the Non-Accounting Safeguards Order as authorizing such joint marketing after a customer subscribes to both interLATA and resold local services, several parties have sought clarification or reconsideration of this aspect of that order.[10] As Ameritech points out in its Comments on this issue, if this was indeed the Commission's decision, that decision is clearly beyond the Commission's authority. The 1996 Act specifies quite clearly when the largest interexhange carriers may jointly market resold local and interLATA services. It does not distinguish between joint marketing that takes place before a customer

---

[10] See, e.g., US West Petition for Reconsideration, Feb. 20, 1997, at 5-7; Ameritech Comments, April 2, 1997, at 24-25; SBC Reply, April 16, 1997, at 2-5.

subscribes or after a customer subscribes to services: joint marketing is equally unlawful in both contexts. Moreover, a decision to permit joint marketing after the customer subscribes would completely undermine the joint marketing restriction that applies before a customer subscribes. Carriers could induce customers to sign up for service with the promise that, immediately thereafter, a package deal would be made available.[11] The Commission should, therefore, take this opportunity to make clear that, while long-distance carriers may offer certain types of post-sale customer care, such as providing a single bill and a single point of contact for maintenance and similar customer service problems, they may not engage in pre or post-sale joint marketing of resold local and long-distance services, and they may not in their marketing materials convey the impression that they do. Because the materials set forth in MCI Exhibit C convey that impression, they violate section 271(e)(1).

V. THE MARKETING MATERIALS ADDRESSED TO LIFELINE CUSTOMERS CLEARLY VIOLATE SECTION 201(b) OF THE ACT

---

[11] The Commission need look no further than MCI's marketing materials for evidence of this kind of bootstrapping. Having convinced the Commission that section 271(e)(1) should not limit the ability of carriers to provide "customer care" in the form of a single bill or a single point of contact to respond to maintenance and other customer inquiries, MCI's materials now tout these advantages. AT&T is likewise advertising these benefits to customers as benefits that can only be obtained by subscribing to AT&T local and long-distance services. When these carriers requested the ability to offer this type of customer care, they implied that this was strictly a matter of post-sale activity. They now use the post-sale authority they secured in advertising campaigns and marketing materials that tout the advantages of purchasing their local and long-distance services together.

Included among the marketing materials attached by MCI to its petition are materials that MCI has sent and proposes to send to prospective Lifeline customers. These materials offer Lifeline service "for the low monthly rate of $5.62." They also state:

> To receive MCI Lifeline service, you must return the enclosed application within 45 days and meet all qualifications as presented in the application. If you do not qualify, or do not return the application within 45 days, you will automatically receive MCI Basic for Home.

A footnote informs customers that MCI Basic for Home costs $10.95.

These materials flagrantly violate section 201(b) of the Act. By informing prospective customers that if they do not apply for MCI Lifeline service within 45 days, they will automatically be enrolled in MCI's, more expensive, basic service, they essentially blackmail customers under false pretenses to enroll in MCI's Lifeline Service. It would be hard to imagine a more reprehensible marketing tactic and a clearer example of an unjust and unreasonable practice. The Commission should investigate this matter further, and if the facts are as they appear, initiate penalty and forfeiture proceedings that reflect the severity of this offense.

VI. MCI HAS MISCHARACTERIZED AMERITECH'S PENDING FORMAL COMPLAINT

While MCI's petition does not directly implicate Ameritech's pending joint marketing complaint against MCI, it does refer to this complaint. It states that Ameritech has filed a formal complaint "challenging an MCI advertisement relating to its facilities-based local service."[12] This characterization of Ameritech's formal complaint is inaccurate.

In its formal complaint, Ameritech alleges that MCI twice ran advertisements in three newspapers that are circulated in areas in which MCI is reselling or plans to resell Ameritech local exchange service. Ameritech's complaint includes a copy of this ad, which states, inter alia, "Complete Telecommunications Bundling. Only from MCI." The ad also announces the availability of "volume discounts based on total spending" on multiple services, including local phone service, long distance, data, conferencing, cellular, paging, and internet." In addition, it claims that MCI can provide, inter alia, local phone service and long distance through "one contract and one contact[.]"

In its Answer, MCI admits that it serves, and intends to serve additional customers, within the circulation area of at least one of the newspapers in which this ad was placed. It also admits that it "quite possibly" will resell Ameritech local services to customers within the circulation area of the other newspapers, although it denies that this is "an irrevocable decision."[13]

---

12 MCI Petition at 5.

13 MCI Answer, File No. E-97-17, June 2, 1997, at paragraphs 17-19.

MCI's characterization of this complaint as a complaint relating to its "facilities-based local service" is thus ludicrous. The complaint clearly relates to MCI's resold local service and it presents a far more obvious and egregious violation of the joint marketing rules than do the marketing materials that are the subject of MCI's petition.

VII. CONCLUSION

When Ameritech urged the Commission, prior to the adoption of the Non-Accounting Safeguards Order, to prohibit joint advertising of local and long-distance services or, at a minimum, to require separate telephone numbers in any joint ad, it did so because of the likelihood that, without at least one of these safeguards, carriers would routinely ignore the letter and intent of the joint marketing prohibition. The Commission rejected Ameritech's position, stating that it would rely, instead, on the enforcement process to evaluate joint marketing claims on a case-by-case basis.

It should come as no surprise that MCI has indeed "pushed the envelope." Without the safeguards Ameritech had proposed, that much was inevitable. What does come as a surprise is that MCI would ask the Commission to relax further the already too-lenient joint marketing rules. The Commission should not fall into this trap. As both Ameritech's formal complaint and this proceeding demonstrate, MCI is intent on engaging in prohibited joint marketing. If the Commission boxes itself in by turning its examples of joint marketing activity into definitive parameters, it will unnecessarily hamstring its ability to prevent further violations of the Act.

The Commission should, therefore, clarify that it meant what it said in the Non-Accounting Safeguards Order: that the examples of joint marketing cited therein are not exhaustive, but illustrative. It should hold, further, consistent with the discussion above, that some of the marketing materials that MCI attaches to its petition violate section 271(e)(1). Finally, it should investigate MCI's Lifeline materials and initiate penalty and forfeiture proceedings, as appropriate.

Respectfully Submitted,

Gary L. Phillips
Counsel for Ameritech
1401 H Street, N.W. Suite 1020
Washington, D.C. 20005
(202) 326-3817

June 9, 1997

CERTIFICATE OF SERVICE

I, Toni R. Acton, do hereby certify that a copy of the foregoing Ameritech Comments has been mailed, by first class mail, to the party listed below on this 9th day of June 1997.

By: ______________________

Toni R. Acton

Frank W. Krogh
Mary L. Brown
MCI Telecommunications Corporation
1801 Pennsylvania Avenue, NW
Washington, DC 20006